88-1625

Supreme Court, U.S.
FILED
MAR 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE UNITED STATES SUPREME COURT

OCTOBER 1988 TERM

WILLIAM (a/k/a 'Cookie') THOMAS,

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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80pp

STATEMENT OF THE QUESTION

1. Whether a property interest is implicated under the Mail Fraud Statute when a police lieutenant distributes wrong answers to a Police Civil Service Examination without prospect of personal gain for himself but rather because he believes that the officers to whom he has given these wrong answers have worked for the Police Department for as long as fifteen years but have been denied Civil Service Protection for political reasons while permanent appointments went to the relatives of Mayors, Councilmen, City Controllers, School Board Members and the like?

2. Whether a property interest is implicated under the Mail Fraud Statute in the absence of a net loss to the City/Employer when twenty police officers,

performing the same tasks and duties before and after the administration of a Civil Service Examination all pass the examination but some have their scores raised and tests changed and thereafter receive the salary and benefits of a Grade I Patrolman upon their appointments to that position in light of the fact that those salaries and benefits would have been paid by the City to any individual who was appointed to fill those vacancies?

3. Whether a mailing is in furtherance of a conspiracy when the mailing occurs after wrong answers to a Civil Service Examination are distributed to twenty individuals and those individuals thereafter take the Civil Service Test and pass on their own merit thus entitling them to take the oral portion of the examination, and

thereafter, the Chairman of the Civil Service Commission changes several answer sheets in order to increase the score of some of those test takers, and thereafter notices are mailed to some of the twenty individuals advising them that they are eligible for the oral portion of the examination?

4. Whether a mailing to any of twenty police officers who have passed a written Civil Service Examination notifying them that they are entitled to take the oral portion of the examination, despite other irregularities in the testing procedure, where the pertinent Civil Service Regulations required notification to each candidate of the rating he has received but did not specify by mail, constitutes a mailing required by state imperative and therefore does not

support a mail fraud conviction?

5. Whether a mailing to any of twenty Reserve Police Officers by United States Mail rather than inter-office mail was reasonably foreseeable or in the ordinary course of business when such notifications were not provided by United States Mail in the past?

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REFERENCE TO OFFICIAL OR UNOFFICIAL REPORTS OF OPINIONS

A verdict of guilty on one (1) count of conspiracy and not guilty on twenty (20) counts of mail fraud was entered in the District Court on May 19, 1988. On July 15, 1988, Judgment in a criminal case was entered by the District Court committing William Thomas to the Custody of the Attorney General of the United States or his authorized representative for a period of two (2) years. No post-trial motions were filed with the District Court and there are no reported or unreported opinions.

Timely appeal was filed with the United States Court of Appeals for the Third Circuit. That appeal was denied by the United States Court of Appeals for the Third Circuit on December 13, 1988. No opinion accompanied that order.

Timely application for rehearing with the United States Court of Appeals for the Third Circuit was made. Said application was denied on January 9, 1989. No opinion accompanied that order.

STATEMENT OF JURISDICTION OF THE COURT

Jurisdiction of this Court is based upon 28 U.S.C.A. Section 1254 (1).

STATEMENT OF THE STATUTE WHICH THE CASE INVOLVES

SECTION 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false of fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or

furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF CASE

On March 15, 1988, the Petitioner, William Thomas, was indicted along with Catherine Sheridan by a federal grand jury of one count of Conspiracy to Commit Mail Fraud and twenty counts of Mail Fraud. Petitioner was arraigned on March 31, 1988 and plead not guilty to the charges contained in the indictment.

On April 22, 1988, Petitioner filed pre-trial motions including a Motion to Dismiss the Indictment. William Thomas previously raised the issues addressed herein relating to property and the mailings in his appeal to the United States Court of Appeals for the Third Circuit.

By Memorandum and Order dated May 6, 1988, the District Court denied Mr. Thomas' Motion to Dismiss the Indictment.

On May 9, 1988, Mr. Thomas' trial was commenced. The jury returned a verdict acquitting him of twenty Counts of Mail Fraud. The verdict convicted Mr. Thomas of one count of Conspiracy to Commit Mail Fraud, Count I of the Indictment. Said verdict was entered May 19, 1988.

On July 15, 1988, final judgment was entered in the District Court and Mr. Thomas was sentenced to a term of imprisonment for two years.

On July 22, 1988, Petitioner filed his appeal to the United States Court of Appeals for the Third Circuit. That appeal was denied on December 13, 1988.

William Thomas thereupon filed for rehearing in a timely fashion. The United States Court of Appeals for the Third Circuit denied rehearing on January 9, 1989.

The Petitioner believes the facts which follow are pertinent to consideration of the Petition for the Writ of Certiorari.

In early November of 1985 it was announced that the City of Scranton would be administering Civil Service Examinations to fill some twenty vacancies in the Patrolman Grade I position with the Scranton Police Department. The examination process would include a written and an oral examination. The scores from both examinations would be totaled, and a final eligibility list would be prepared and presented to the Mayor. The Mayor would have discretion to choose any twenty persons for appointment out of the top thirty-four applicants.

The written examination for the Patrolman Test was scheduled for December

7, 1985, at Central High School Scranton. At or about the same time Civil Service Examinations for promotions within the Police and Fire Department were also scheduled.

Sometime after the scheduling of the tests was announced, but before the written examination on December 7, 1985, Thomas O'Hara, the Chairman of the Civil Service Commission, removed what he thought at that time, was the Answer Key for the Patrolman Grade I Test and gave it to acting Police Lieutenant William Thomas, the Petitioner in this action.

Thomas O'Hara testified as a Government witness at trial. Mr. O'Hara testified that he provided Lieutenant Thomas with what Mr. O'Hara originally thought to be the Answer Key to the Patrolman Grade I Examination. In his

testimony at trial, he stated that he did not, in fact, know what it was that he had given to William Thomas and did not know whether these were answers to any City examination at all.

Once William Thomas received what had been thought to be answers, he provided the information to certain reserve patrolmen. At trial William Thomas testified that he provided the answers to those officers whom he thought were best qualified for the job and who had been previously denied a patrolman's position as the result of politics. On the day of the examination, December 7, 1985, William Thomas received a call from one of the reserve officers to whom he had given the answers to the examination. William Thomas was advised that he had distributed the wrong answers and that they did not

match the questions on the examination.

William Thomas then went to Central High School where he was to take his promotional examination. At Central High School he spoke with Thomas O'Hara who had been overseeing the administration of the entry level (Patrolman's) tests. When William Thomas spoke with Thomas O'Hara, Mr. O'Hara had already been told by one of the reserve patrolmen that he, had been given the wrong answers. Mr. O'Hara advised that officer, before he spoke to William Thomas, that he, O'Hara, would resolve the problem. Mr. O'Hara told William Thomas that he had not known that the answers were incorrect and that he, O'Hara, would take care of his mistake.

On Monday, December 9, 1985, the written examinations for Patrolmen Grade I were marked and scored. They were

corrected in a locked room with only Thomas O'Hara and Catherine Sheridan present. Thomas O'Hara testified at trial that when he came into work on that Monday, he found an envelope on his desk which he, O'Hara, had assumed came from William Thomas. He said that the envelope contained a list of approximately ten (10) names which he assumed were the names of the individuals to whom William Thomas had given the wrong answers.

Mr. O'Hara testified that to the best of his knowledge each of the twenty (20) Police Officers, eventually appointed as Patrolmen, had passed the test on his own. Each was qualified to take the oral examinations before he, O'Hara, changed any of the tests. Mr. O'Hara testified on direct examination at trial that to the best of his knowledge each of the twenty

appointees had gotten a score of at least seventy (70).

Before correcting the test, Mr. O'Hara testified that he gave the list, which he had found upon his arrival at work that Monday morning, to Catherine Sheridan and asked her to read the names from the list. As she read the names from the list, Mr. O'Hara testified that he, himself, pulled those tests from the pile of examinations. Mr. O'Hara then proceeded to alter the scores giving each individual whose paper he changed a grade which he believed would be high enough to guarantee their appointment to the position for which they applied. At trial, his testimony as to the number of papers he actually changed ranged from five (5) to eleven (11).

Mr. O'Hara testified that while he was altering the scores, Catherine Sheridan told him to make sure that he used the same color ink. Mr. O'Hara also testified that he destroyed the original answer sheets after Ms. Sheridan told him he had better destroy them. Mr. O'Hara testified that it would be impossible for him to say which tests were changed, which were not changed, who got the score that they deserved and who did not.

According to the Government's case, soon after the tests were corrected the notices to appear for the oral examination were mailed by United States Mail to those individuals who had received a score of seventy or better on the written portion of the examination. The Indictment was limited to the purported mailings to the twenty (20) reserve officers who were

eventually appointed.

On cross-examination at trial, Mr. O'Hara testified that he prepared a test for 1985 taken from the canceled 1984 test. There were fifty questions on the 1984 test and there were twenty-five questions on the December 1985 test. The twenty-five letters and numbers distributed by Mr. O'Hara did not correspond with the actual test which he administered. Mr. O'Hara testified that he did not know what these twenty-five letters and twenty-five numbers were that he caused to be distributed. In fact, he testified that he did not know whether these were "fake answers" that somebody made up and just stuck in the file at some time.

Mr. O'Hara further testified that it would be impossible for him to tell the

jury at trial what tests were changed, whose tests were changed, who got the score they deserved and who did not.

All twenty appointees were reserve patrolmen working on a regular basis from police headquarters in City Hall.

The government's case alleged that soon after the written tests were corrected, the notices to appear for the oral examination were mailed by United States Mail to those individuals who had received a score of seventy (70) or better on the written portion of the examination. Specifically, the government alleged that the twenty police officers specifically identified in the Indictment were sent notice by the United States Mail.

According to Thomas O'Hara, notice for a prior fireman's test administered by

Dr. Cannon was given to the candidates by telephone. In the ordinary course of business, the United States Mails were not utilized for communications between one office and another or one person and another inside City Hall.

The sum of the testimony of the witnesses established that the normal course of business was for them to receive such mail in the inter-office box in the Police Station. Cathy Sheridan wanted to telephone the individuals who had passed the oral examination. Thomas O'Hara made the decision instead that they should be mailed. O'Hara's decision was based upon his prior experience of having provided such notice by telephone. He decided on mail because there was "a very delicate time element".

Most of the police officers who

testified related that they were notified to report for the oral interview by phone, or in the interoffice mailbox, or they just couldn't remember. A few did indicate that they had received these notices through the United States Mail.

In the instant case, all twenty (20) of the notifications referenced in the Indictment went to reserve police officers who had passed the examination on their own merit. Regardless of whether the wrong answers were given to these men they each passed the test. As a consequence each was qualified to take the oral examination. So, too, the Secretary of the Civil Service Commission was required to provide them with notification to come in for oral examinations.

Oral examinations were conducted, scores combined, and a final list

presented to the Mayor. The Mayor chose the top twenty on the list. The top twenty, were sworn in on December 28, 1985, and since that time have been paid the salary and benefits of a Patrolman grade I in the Police Department of the City of Scranton.

Subject Matter Jurisdiction in the District Court arises out of the alleged violation of the Federal Mail Fraud Statute 18 USC Section 1341, by virtue of 18 USC Section 3231.

Appellate jurisdiction in the United States Court of Appeals for the Third Circuit was based upon 28 USC Section 1291 as this is an appeal from the final judgment of the United States District Court for the Middle District of Pennsylvania.

ARGUMENT

I. WHETHER THE INDICTMENT, PROOF AT TRIAL AND CHARGE FAIL TO MEET THE REQUIREMENT OF THE MAIL FRAUD STATUTE THAT THE SCHEME CONTEMPLATES A LOSS OF MONEY OR PROPERTY.

Before MCNALLY V. UNITED STATES, 107 S.Ct. 1878 (1987) it was believed that the Mail Fraud Statute prohibited schemes to defraud citizens of their intangible rights to honest and impartial government. However, the Supreme Court held in MCNALLY, Supra. 1879, that, "the Mail Fraud Statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government". As aptly stated by the Court in MCNALLY and affirmed by CARPENTER V. UNITED STATES, 108 S.Ct. 316 (1987) the Mail Fraud Statute is designed only to

protect property rights. In order for a violation of the Mail Fraud Statue to occur, the victim must be defrauded of money or property. MCNALLY, 2881.

Following MCNALLY and CARPENTER many Courts have had to grapple with the task of whether a proposed scheme fell within the strictures of the Supreme Court decisions. Recently, in UNITED STATES V. ASHER, 854 F.2d 1483 (3rd. Cir. 1988), the Third Circuit conducted a thorough and insightful analysis of the MCNALLY/CARPENTER line of cases.

> "[A] common thread running through each of these cases can be discerned. While we recognize that cases may fall on either side of the McNally/Carpenter line, those cases that have sustained mail fraud convictions have done so where the "bottom line" of the scheme or artifice had the inevitable result of effecting monetary or property losses to the employer or to the state...

> Essentially, therefore, where rights are involved whose violation would lead to no concrete economic harm, and where those rights are the only rights involved in the case, McNally's proscriptions would prevent upholding conviction on appeal." Id. at Page 1494.

In the instant case, the Government alleged and the District Court charged that the money or property requirement of the Mail Fraud Statute was pleaded in the Objectives of the Conspiracy Section of the Indictment. The District Court further charged that the City of Scranton Answer Keys, which the Indictment alleged were removed from the filing cabinet in the Civil Service Commission's Office and the Test Answer Sheets, which the Indictment alleged were altered and destroyed on Monday, December 9, 1985, might be determined by the jury to be property of the City of Scranton,

confidential in nature and within the protection of the Mail Fraud Statute. The Court also charged that a further property consideration for the jury would be salaries and benefits of the position of Patrolman Grade I, and that too might constitute a deprivation of property under the Mail Fraud Statute.

The jury in the instant case returned a general verdict. It is impossible to determine upon which of the three grounds for property deprivation the jury rested its verdict. "A general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because a verdict may have rested exclusively on the insufficient ground." ZANT V. STEPHEN, 462 U.S. 862, 881 (1983). In keeping with

this precedent, the Third Circuit recently held that Jury Instructions which allow conviction for conduct outside the proscription of the Mail Fraud Statute constitute both plain error and a defect effecting due process rights requiring a reversal. UNITED STATES V. PICCOLO, 835 F.2d 517, 519 (3rd Cir 1987). See also UNITED STATES V. OCHS 842 F.2d 515, 521 (1st Cir. 1988). Petitioner submits that for any of the following reasons the District Court erred in defining the money or property requirement of the Mail Fraud Statute thereby charging the jury in a manner which would allow a conviction for conduct outside the proscription of the Mail Fraud Statute and requiring reversal of Petitioner's conviction. Likewise, it is submitted that the Indictment fails to allege a deprivation of money or property

and that the proof at trial failed to establish that fact. Finally, it is submitted that the United States Court of Appeals for the Third Circuit failed to apply the Mail Fraud Statute in accordance with the decisions of this Court.

A. WHETHER THE INDICTMENT, PROOF AT TRIAL AND CHARGE FAILED TO MEET THE REQUIREMENT OF THE MAIL FRAUD STATUTE THAT THE SCHEME CONTEMPLATES A LOSS OF MONEY OR PROPERTY SINCE THE PAYMENT OF SALARIES AND BENEFITS TO THE PROMOTED PATROLMAN CAUSED THE CITY TO SUFFER NO CONCRETE ECONOMIC HARM.

The District Court charged that the payment of salaries and benefits to the twenty individuals appointed to the position of Patrolman Grade I could constitute a deprivation of property.

In so charging, the District Court misconstrued the Supreme Court's decision in UNITED STATES V. CARPENTER, 108 S.Ct

316, (1987) and the Third Circuit failed to correct this error. The Court in CARPENTER held that financial loss was not necessary because the victim in that case had already been defrauded of its property, confidential business information. The victim in the CARPENTER case was the Wall Street Journal. Confidential business information is its stock in trade. There is no question that such confidential business information constituted intangible property of the Wall Street Journal.

In CARPENTER it was clear that the victim had been defrauded of property. Therefore, no monetary loss need be established. Likewise, there is no question that the salaries and benefits in question in the instant case are paid in the form of money. In order to meet the

property requirement of the Mail Fraud Statute through the payment of salaries and benefits, however, the government must show that the City of Scranton was deprived of its money. As the United States Court of Appeals for the Third Circuit recently observed in ASHER, supra, at 1494, mail fraud convictions have been upheld where the "bottom line" of the scheme results in monetary or property losses to the employer or state and have been reversed where violation of the rights involved lead to no concrete economic harm. For any of the reasons set forth below the bottom line of the payment of the salaries and benefits to the patrolmen neither results in a monetary loss to the City nor does it result in any concrete economic harm to the City.

It is entirely possible that the jury

rejected the government's theory that wrong answers or altered or destroyed tests meet the property requirement and, instead, that the jury based its conviction of William Thomas solely on the salaries and benefits received by the patrolmen. It was not necessary for the jury to have concluded that William Thomas conspired to deprive the City of the Answer Key or altered tests for them to have concluded he was responsible for conspiring to deprive the City of the salaries and benefits paid to the patrolmen. As more fully set forth below a conviction based on the payment of said salaries and benefits allows a conviction for conduct outside the proscription of the Mail Fraud Statute, requiring a reversal of the conviction.

B. WHETHER THE INDICTMENT, PROOF AT TRIAL AND CHARGE FAIL TO MEET THE REQUIREMENT OF THE MAIL FRAUD STATUTE THAT THE SCHEME CONTEMPLATE A LOSS OF MONEY OR PROPERTY SINCE THE CITY OF SCRANTON WOULD HAVE BEEN REQUIRED TO PAY SOME PATROLMAN THE SALARY OR BENEFITS OF THE POSITION.

In INGBER V. ENZOR, 664 F.Supp. 814 (S.D. NY 1987), Affirmed 841 F.2d 450, (3rd Cir. 1988), the District Court vacated the conviction of a town supervisor for violating the Mail Fraud Statute by falsifying absentee ballots in connection with an election. At trial the Court had instructed the jury, inter alia, that the jury could find fraud in the taking of the town supervisor's salary. In its later opinion the District Court ruled that the instruction was erroneous and that, "payment of the supervisor's salary, a routine and budgeted town expenditure, to Ingber rather than to his

opponent ... does not constitute a loss of money or property as contemplated by MCNALLY in the Mail Fraud Statute." INGBER, supra at 821. The Court reasoned that "the salary of the office of Town Supervisor would have been paid to some victorious candidate regardless of INGBER'S attempt to control the outcome of the election". (emphasis in original) Id. at page 822.

In determining whether the payment of a salary and benefits to an individual for work performed in a position he may not merit amounts to a deprivation of money or property under the MCNALLY/CARPENTER line of cases, Mr. Thomas submits that the reasoning followed by the Second Circuit in the INGBER case was consistent the Third Circuit's analysis in ASHER, supra, which focuses on the need for concrete

economic harm or a bottom line loss to sustain a conviction under the Mail Fraud Statute. As noted by the United States Court of Appeals for the Third Circuit Court in ASHER, MCNALLY did not involve an allegation of lost savings by the State of Kentucky. Since the City of Scranton would have been obliged to pay any person who legitimately passed the Civil Service Examination and was appointed to the position, the salary and benefits of Patrolman Grade I, the City suffered no concrete economic harm.

The Third Circuit distinguished MCNALLY and ASHER. In ASHER, at 27, that Court noted that MCNALLY did not involve an allegation of lost savings by Kentucky. This Court stated that "the contract itself deprived the Commonwealth of tangible savings that it would have

derived from a less expensive agreement." Id. In the instant case there is no suggestion that if some or all of the twenty vacancies in the police department were filled by individuals other than the twenty actually appointed, that any savings would accrue to the City.

In ASHER, at 27, the government provided evidence that Arthur Young, Inc., was willing and able to perform the same services as CTA but at a substantially lower cost to the Commonwealth than CTA's contract. Additionally, the Secretary of the Budget testified that an in-house recovery of overpaid FICA taxes on behalf of all state employees by using state computers at an estimated cost of $200,000.00 Id. at 1495. He also testified that he would have made the employees who worked on this project

available to the Treasury Department, had he been asked to do so. That Honorable Court went on to state:

> "Thus the record contains a plethora of government evidence demonstrating the potential savings the Commonwealth would have received had the FICA recovery contract been not awarded to CTA on a no bid basis. These potential monetary savings by the Commonwealth were made evident during the trial and clearly support the government's claim that tangible losses by the commonwealth would have resulted from the scheme devised by Asher and his co-conspirators had that scheme succeeded." Id.

Petitioner would urge this Court to consider the fact that any entering patrolman, Grade I would receive the same salary and benefits as each of the twenty who were in fact appointed. Unlike ASHER at 1496 where the scheme "would have had the effect of requiring Pennsylvania to bear the burden of an enhanced cost for a

service available at a substantially lower price", the City of Scranton could not have appointed twenty other police officers for a substantially lesser cost or for any lower price at all.

Similarly, in ASHER, tne Third Circuit cited with approval UNITED STATES V. WELLMAN, 830 F.2d 1453 (7th Cir. 1987. The Court described the defendants scheme therein as one that:

> "... caused the [government] to pay more than it need have, so it cannot be said that the cost would necessarily have been paid to some company in the sense that this was true in McNally. In fact, a lesser cost could have been paid to the prime contractor if the defendants had negotiated subcontracts that did not include the cost of bogus marketing agreements and other kickbacks." ASHER, at 1494.

Here each individual who filled a vacancy was paid the same amount, no more - no less, than any other individual who would have been appointed would have received.

By analogy, if the City had a need for the services of twenty (20) security officers and offered a contract for these services and William Thomas, through some trick or connivance, secured this contract for his friend, under MCNALLY if the cost of the contract was the same, it would not ground a mail fraud conviction. In essence, the bottom line in this case is not "how much" but "who" and, as noted by the United States Court of Appeals for the Third Circuit in ASHER, if the bottom line is not the inevitable result effecting monetary or property losses to the employer or the state, the decisions of this Honorable Court require that the conviction not be sustained. ASHER, at 1494.

C. WHETHER THE INDICTMENT, PROOF AT TRIAL AND CHARGE FAIL TO MEET THE REQUIREMENT OF THE MAIL FRAUD STATUTE THAT THE SCHEME CONTEMPLATE A LOSS OF MONEY OR PROPERTY SINCE THE PAYMENT OF SALARIES AND BENEFITS IS NOT AN ECONOMIC INTEREST BUT RATHER A BREACH OF THE CITY'S ETHEREAL RIGHT TO HONEST AND QUALIFIED EMPLOYEES.

The gravamen of the Government's complaint throughout the prosecution of this matter, with regard to the payment of the salaries and benefits was seen in the Objective of the conspiracy Section of the Indictment itself which alleged that the payment of money in the form of salaries, benefits and other compensation to police officers who had not legally qualified for the position defrauded the City of tangible property.

The government's complaint is not that the salary and benefits were paid but that the officers were not qualified to receive the money and benefits because of

their failure to legitimately pass a Civil Service Examination for the position. There is no dispute and the Government has made no allegation that the officers in question failed to do the police work for which they were paid. The Government's allegation of fraud hinged on the premise that these officers, some of whom had done exactly the same work for many years prior to appointment, where not qualified to perform the duties they were paid to perform. At best these allegations state a claim for a breach of the City's ethereal right to honest and qualified employees which cannot form the basis of a Mail Fraud prosecution. See MCNALLY, CARPENTER and ASHER, supra.

As the First Circuit aptly stated in UNITED STATES V. OCHS, 842 F.2d 515 (1st Cir. 1988), "we do not think Court's are

free to simply recharacterize every breach of fiduciary duty as a financial harm, and thereby to let in through the back door the very prosecution theory that the Supreme tossed out the front". The Government's attempt to find the deprivation of property in the payment of salaries and benefits to the patrolmen is an attempt to do just the same, which Petitioner recommends this Court reject.

D. WHETHER THE INDICTMENT, PROOF AT TRIAL AND CHARGE FAILED TO MEET THE REQUIREMENT OF THE MAIL FRAUD STATUTE THAT THE SCHEME CONTEMPLATE THE LOSS OF MONEY OR PROPERTY SINCE THE ALLEGED LOSS OF THE ANSWER KEY AND ALTERED OR DESTROYED TEST SHEETS CAUSED THE CITY NO CONCRETE ECONOMIC HARM.

As stated in UNITED STATES V. MCNALLY, 107 S.Ct. 2879, insofar as the sparse legislative history reveals anything, it indicates that the original impetus behind the Mail Fraud Statute was

to protect the people from schemes to deprive them of their money or property. The deprivation of money or property must be the object of the scheme. As the Seventh Circuit has held in UNITED STATES V. WELLMAN, 830 F.2d 1453 (th Cir. 1987) the intangible rights cases rejected by the MCNALLY Court are those that, "involve rights whose violation would ordinarily result in no concrete economic harm". The United States Court of Appeals for the Third Circuit has recently adopted this approach in UNITED STATES V. ASHER, 854 F.2d 1483 (3rd Cir. 1988), Page 23, in observing of the MCNALLY/CARPENTER line of cases,

> those cases that have sustained mail fraud convictions have done so where the "bottom line" of the scheme or artifice had the inevitable result of effecting monetary or property losses to the employer or to the state ... and

> Essentially, where rights are involved whose violation would lead to no concrete economic harm,... McNally's proscriptions would prevent upholding conviction on appeal. ASHER, at 1494.

The Court went on to state that where, on the other hand, a violation of the rights involved would result in depriving another of something of value, the conviction has been upheld.

In the instant case, the jury was charged that they may find the property requirement for the Mail Fraud Statute in the removal and distribution of the Answer Key to the Civil Service Examination and the altering and destroying of Civil Service Tests. The City of Scranton suffered no concrete economic harm as a direct result of the taking of a combination of letters and numbers when Thomas O'Hara, Chairman of the Civil Service Commission, testified that he did

not know what they were and did not know whether they were answers to any examination. This case is distinguishable from the CARPENTER case in that the confidential business information taken from the Wall Street Journal was the Wall Street Journal's stock in trade. It cannot be said that a meaningless jumble of numbers and letters which could not be identified as being answers to a specific test or any test at all had the same importance to the City of Scranton. In UNITED STATES V. GIMBLE, 830 F.2d 621 (7th Cir. 1987) the Seventh Circuit held that a scheme to deprive the government of CTR's (documents required to be filed by banks concerning cash transfers), did not deprive the Government of money or property under the Act. Finally, the Sixth Circuit in UNITED

STATES V. MURPHY, 836 F.2d 248 (6th Cir. 1988) held that the right to accurate information with respect to the issuance of bingo permits constitutes an intangible right and thus a scheme or artifice as was charged in the indictment there does not state a crime.

The attempt, therefore to find a property requirement under the Mail Fraud Statute in the taking of what could not be identified as an Answer Key and the altering or destruction of the Test Sheets is an example of the type of overreaching concerning the Mail Fraud Statute, which this Court warned against in MCNALLY.

The jury could have easily based its finding that the property deprivation requirement of the Mail Fraud Statute was met solely by the taking of what could not be identified as an Answer Key or the

altering or destruction of the Test Sheets, under the facts and circumstances of this case this conduct is outside the proscription of the Mail Fraud Statute.

E. **WHETHER THE INDICTMENT, PROOF AT TRIAL AND CHARGE FAIL TO MEET THE REQUIREMENT OF THE MAIL FRAUD STATUTE THAT THE SCHEME CONTEMPLATE A GAIN OF MONEY OR PROPERTY FOR THE DEFENDANT.**

In UNITED STATES V. BALDINGER, 838 F.2d 176 (6th Cir. 1988), the Sixth Circuit held that the effect of the MCNALLY and CARPENTER decision demonstrates that Congress by enacting the Mail Fraud Statute intended, "only to reach schemes that have as their goal to transfer something of economic value to the Defendant". Id. at 180. The BALDINGER case involved a scheme by which the Defendant for the sake of personal revenge sent letters to his victim's customers and as a result of which his victim lost

business. The Defendant, however, did not profit from his scheme. The Court, while recognizing that CARPENTER affirmed that the Mail Fraud Statute applies to intangible property interests, held that "McNally rejected the line of cases which predicates criminal liability only upon general acts of dishonesty or illegality unrelated to motives of property gain, whatever its nature". Id. at Page 179. The Court then reversed BALDINGER'S conviction on the basis that the jury may have convicted him even though he may not have been motivated by personal gain.

In the present case, the District Court charged the jury that "it's not necessary for the Government to show that a defendant benefited or profited from the scheme".

In a case heavily relied upon by the

government in the prosecution of this case. UNITED STATES V. DOHERTY, 675 F.Supp 726 (D.Mass. 1987), that District Court awarded Nelson E. Barner a new trial. The Court there found that Barner did not himself financially gain from the general implementation of the conspiracy charged. Although the District Court expressed its opinion that under MCNALLY it does not appear necessary that the defendant himself gain but only that in the circumstances of the case he intend that the Commonwealth fraudulently be deprived of money or property. However, the Court went on to state that because evidence of Barner's direct financial gain was lacking then "the issue whether the jury meant to find that Barner specifically intended to defraud the Commonwealth of money or property is excruciatingly close - so

close that justice requires that [This Court] resolve it in favor of the accused. Citation Omitted. Id. at 736.

The Government has not alleged nor argued, nor has there been any proof, that William Thomas received any benefit from the scheme or that he even intended to receive any benefit. There is no evidence of record which would even suggest that William Thomas received any money or property from any source for his involvement with the scheme. Clearly this is a case which attempts to predicate criminal liability only upon general acts of dishonesty or illegality unrelated to motives of property gain. This is the type of case specifically rejected by MCNALLY. This is nothing more nor less than a good government case which cannot be prosecuted under the Mail Fraud Statute

requiring reversal of Petitioner's conviction.

In CARPENTER the defendants utilized the timing and contents of a Wall Street Journal column to trade in stocks. They did this for a profit. Here, a police lieutenant encountering men he worked with for seventeen years wanted to correct the abuses he had seen in the system during all that time. This lieutenant was given a sheet with numbers and letters, a meaningless jumble. These were not the test answers for the 1985 test or the 1984 test. Thomas O'Hara, the only witness presented by the government capable of describing what he gave to William Thomas said he did not know what they were. Yet the government alleged that this is "confidential, intangible property".

William Thomas distributed these

wrong answers because the men he gave them to, he believed, were qualified and had been excluded from these jobs for political reasons for many years. He did not and there is no suggestion in the evidence that he gave these men the answers so he could make money for himself.

The indictment also alleged that the citizens had an intangible property right to a civil service list complying with the law and reflecting the true and correct test scores and the most qualified examinees. In other words, the public, it was alleged, had a right to a list reflecting all relevant facts necessary to select a police officer. However, if there is such a right, it is subsumed in the public's right to honest government, MCNALLY V. UNITED STATES, 107 S.Ct 2785,

2878, N.3 (1987) which states that the public's right to be aware of all relevant facts would be included in their right to honest government. See also, UNITED STATES V. MURPHY 836 F.2d 248 (6th Cir. 1988) which provides that the right to accurate information is an intangible right and cannot support a mail fraud conviction.

II. WHETHER THE INDICTMENT, PROOF AT TRIAL AND CHARGE FAILED TO MEET THE REQUIREMENT OF THE MAIL FRAUD STATUTE SINCE THE OBJECTIVES OF THE ALLEGED CONSPIRACY WOULD HAVE BEEN ACCOMPLISHED PRIOR TO ANY MAILING.

The Indictment alleged that one of the objectives of the conspiracy was to provide "confidential test answers". The Indictment alleged that this occurred prior to December 7, 1985. The Indictment further alleged that the mailing of notifications for the oral examination

occurred on December 11 and 12, 1985.

The Indictment alleged that another objective of the conspiracy was to alter test scores. The Indictment alleged that such scores were altered on or after December 7, 1985. Once again, this objective of the conspiracy would have been accomplished prior to the date of the alleged mailing of the notification of the oral examination.

The mailing alleged must be in furtherance of the fraudulent scheme. KAHN V. UNITED STATES, 323, U.S. 88, 89 L.Ed.88 (1944); PARR V. UNITED STATES, 363, U.S. 370, 4 L.Ed.2d 1277, and UNITED STATES V. MAZE, 414 U.S. 395, 38 L.Ed.2d 603 (1974). In no way does the purported mailing further either the distribution of the answers (whether correct or incorrect) nor does it further the altering of test

scores.

The Court charged in that regard as follows:

> What the evidence in the case must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly formed and that one or more of the means or methods described in the Indictment were agreed upon to be used in an effort to effect or accomplish some object or purpose of the conspiracy as charged in the Indictment. And that two or more persons, including one or more of the accused were knowingly members of the conspiracy as charged in the Indictment.

On this basis, the jury could have found that Petitioner agreed to distribute test answers.

Since the objective was completed prior to the mailing, the mailing was not in furtherance thereof. Since the jury could have convicted merely on the distribution of test answers, despite the fact that the mailing was subsequent thereto and did not further that

objective, the conviction cannot stand.

III. WHETHER THE GOVERNMENT HAS FAILED TO ALLEGE FACTS IN THE INDICTMENT OR TO PROVE A MAILING IN FURTHERANCE OF THE PURPORTED SCHEME TO DEFRAUD SO THAT THE COURT IS WITHOUT JURISDICTION IN THE CASE AT BAR.

The last act alleged to have been performed by either Mr. O'Hara, William Thomas or Catherine Sheridan that is alleged by the government to be improper is the changing of the answer sheets. Subsequent thereto, however, the government alleges that the Petitioner and others allowed the top twenty individuals to be sworn in and placed on the City payroll.

As of this point in time, there had not been a mailing of any kind nor did the government allege or prove any such mailing in furtherance of the scheme to defraud.

Subsequent to the acts outlined above, notices were sent to 178 people to report for the oral part of the exam. These included the twenty (20) officers eventually appointed, who had passed the test before any changes were made.

It is basic that for a mailing to come within the Federal Mail Fraud Statute, the mailing must be for the purpose of executing the scheme. The alleged scheme presented by the government at trial, was to secure higher grades for the favored individuals on the written part of the Civil Service Exam for Patrolman I. The members of the favored class received the higher grades before any mailing took place.

If the fraud contemplated by the scheme had already been completed, here a higher mark in the written exam, then a

subsequent mailing could not be used to bring the alleged fraud within the ambit of the Federal Mail Fraud Statute.

In **UNTIED STATES V. MAZE**, 94 S.Ct. 645 (1974), the accused used a stolen Bank America Credit Card at motels in several states to secure food and lodging. The government bottomed it case on the fact that the accused caused the mails to be used when each motel forwarded by mail the sales slips of his purchased to the issuing bank.

The Court held that while the accused may have "caused" the mailings the more difficult question was whether the mailings were sufficiently closely related to the accused's scheme to bring his conduct within the statute. Mr. Justice Rehnquist citing with approval **KAHN V. UNITED STATES**, 65 S.Ct. 148 (1944) and

PARR V. UNITED STATES, 80 S.Ct. 1171 (1960) held that there was not a sufficient connection between the mailings and the accused's scheme to defraud.

In **KAHN**, supra, corporate officers set up a dummy corporation through which to divert profits of their own corporation to their own use. They fraudulently obtained checks payable to them which were cashed or deposited at a bank and then mailed for collection to the drawee bank. The Supreme Court held that the fraud was completed at the point at which the defendants cashed the checks. The Court in **KAHN**, supra, said:

> "The scheme in each case had reached fruition. The persons intended to receive the money, had received it irrevocably. It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank."

In **PARR**, supra, the defendants were accused of charging gas to the school district account, the oil company mailed the bills to the school district and the school districts payments were by check sent through the mail. The Supreme Court again found that there was not a sufficient connection between the mailing and the execution of the defendant's scheme.

It seems clear that in view of the holdings of the Supreme Court in **MAZE, KAHN**, and **PARR**, the mailing alleged by the government fails to provide a sufficient connection between the mailing and the execution of the defendants scheme. The scheme was completed, it had reached fruition, those who were to receive higher marks on the written exam had already received them at the time the mailings

took place.

However, of even greater importance, is the rule that the mailing of a thing which the law required to be mailed **may not** be regarded as mailed for the purpose of executing a scheme or plot.

In **PARR V. UNITED STATES**, 80 S.Ct. 1171 (1960) School Board members and employees sent out tax bills by mail and upon receipt of payment by mail converted some of these funds to their own use. The Court after pointing out that there is no case which holds that "the mailing of a thing which the law required to be mailed may be regarded as mailed for the purpose of executing a plot or scheme to defraud" said further at page 1183 that:

> "... for the purpose of executing such a scheme" within the meaning of section 1341, for we think it cannot be said that the mailings made or caused to be made under the

> imperative command of duty imposed by state law are criminal under the Federal Mail Fraud Statute, even though some of those who are so required to do the mailing for the District plan to steal, when or after received, some indefinite part of its monies." (Emphasis Added)

In **UNITED STATES V. TARNOPOL**, 561 F.2d 466 (3rd Cir. 1977), the Third Circuit citing the holding in **PARR**, supra, included not only routine mailings required by law but extended it to routine mailings, innocent in themselves, necessary or convenient to carry out an ordinary business enterprise.

The Court in **TARNOPOL**, supra, said at page 472 that:

> "We do not believe that there is a valid distinction to be drawn between those routine mailings which are required by law and those routine mailings, themselves intrinsically innocent, which are regularly employed to carry out a necessary or convenient procedure of a legitimate business

> enterprise. In either case the mailings themselves are not sufficiently closely related to the fraudulent scheme to support a mail fraud prosecution even though securing the funds received through some of them is the object of the scheme to defraud."

It seems clear that the mailing used to bring the mail fraud prosecution in this case was not for the purpose of executing the alleged scheme and, therefore, cannot be used as a basis for a mail fraud prosecution. See **MAZE**, **KAHN** and **PARR**, supra.

However, whatever doubt may remain as to the mailing in the case at bar, was disposed of by the holding in **PARR**, supra, that a mailing required by law may not be used to form the basis for a Federal Mail Fraud prosecution. See also **TARNOPOL**, supra.

IV. WHETHER THE NOTIFICATION REQUIRED BY STATE IMPERATIVE CANNOT BE FOUND TO SUPPORT A MAIL FRAUD CHARGE OR CONVICTION.

In the instant action the indictment alleged in Conspiracy Count by incorporation the language that the defendants mailed or caused to be mailed "a notification that ... was to report to the Scranton Municipal Building for an oral interview at a date and time filled in on said notification, and further notifying each person that failure to report for the oral interview would result in each person being graded on the written exam only".

The action alleged in the Indictment, providing a time and date for the oral examination, is a responsibility imposed upon the commission by the commissions own regulations.

Further, the regulations, Rule IX, paragraph 5, require the "secretary, as early as practicable after the completion of an examination to notify each candidate therein of the rating he has received ...". In this regard, the rating was qualification for the oral portion of the examination as stated in the Indictment. Former Civil Service Commissioner Hazel Price testified in regard to this matter at trial.

It is respectfully submitted that the statute need not specifically require mailing; rather, only that the mailing be required by imperative command of duty imposed by state law. **PARR** at 1183. See also **MCNALLY** at 2878, N.2. In this case the device which was utilized according to the government was the United States Mail.

In **UNITED STATES V. MITCHELL**, 744 F.2d 701, 704 (9th Cir. 1984), the Court distinguished the case before it from **PARR**. The Court found that the tax statements, checks and receipts included in **PARR** were sent out regularly and routinely and would not have been mailed even if the scheme to defraud the district had not existed. In **MITCHELL**, the fraudulent scheme triggered the mailing which would not have occurred except as a step in the scheme.

In the instant case, since all those who had achieved a score of seventy would get a notification, it cannot be said that the mailings would not have been mailed if the alleged scheme had not existed. Consequently, it is submitted, the conspiracy to commit mail fraud cannot be grounded thereupon.

V. WHETHER THE GOVERNMENT FAILED TO PROVE AT TRIAL THAT THE MAILING IN THIS CASE WAS EITHER IN THE NORMAL COURSE OF BUSINESS OR REASONABLY FORESEEABLE.

Use of the mails here was neither reasonably foreseeable nor in the ordinary course of business. Thomas O'Hara testified that in the past he had provided notification by telephone. In regard to the notification in question in this case, Ms. Sheridan wanted to give notice by telephone. Because of his prior experience using the telephone and because of what he described as "a very delicate time element", Mr. O'Hara disagreed with Cathy Sheridan's recommendation and decided to send the notices through the United States Mail.

All of the Police Officers who were appointed in regard to this examination were Reserve Officers. The notifications

to these twenty officers constitute the basis for Federal jurisdiction in this action. It was the consensus of these officers that in the ordinary course of business, they received communications generated inside City Hall by interoffice mail. So, too, the testimony of William Baker, Business Administrator for the City of Scranton was that he received ninety-nine percent of the communications generated inside City Hall by interoffice mail. So, too, this was the testimony of Debbie Murphy Piesecki who had been a secretary in City Hall since 1974 and who, in 1985, worked with Thomas O'Hara and handled all his mailing both interoffice and by United States Mails.

The only evidence which the government attempted to present on whether the in-question mailings were in the

ordinary course of business or reasonably foreseeable, came in its cross examination of William Thomas. Since such mailings to police officers working for and in the police department were obviously not done in the ordinary course of business, the government addressed whether the mailings were reasonably foreseeable.

SUMMARY

It is respectfully submitted that the Indictment failed to set out an interest in money or property. The evidence presented at trial failed to establish such an interest and the charge of the court failed to establish that the bottom line of the scheme had to involve a substantial economic loss.

The mailing here was required by the Civil Service Regulations of the City of Scranton. The mailings at issue went only

to Reserve Police Officers. The mailings were not in furtherance of the purported scheme.

Additionally, the evidence in this case clearly establishes that the mailing of these notifications did not occur in the normal course of business and were not reasonably foreseeable.

CONCLUSION

Based upon the foregoing, this Petitioner respectfully requests that this Honorable Court grant a Writ of Certiorari in this action.

/s/ William Thomas
William Thomas
Pro Se

CERTIFICATE OF SERVICE

I, **WILLIAM THOMAS** hereby certify that I have this 1st day of April 1989, served the foregoing **PETITION FOR WRIT OF CERTIORARI** upon the following individual, sent through the United States Mail to:

MALACHY MANNION
UNITED STATES ATTORNEY
FEDERAL BUILDING
SCRANTON, PA 18503

/s/ William Thomas
William Thomas

CERTIFICATE OF SERVICE

I, **WILLIAM THOMAS** hereby certify that I have this 1st day of April, 1989, served the foregoing **PETITION FOR WRIT OF CERTIORARI** upon the following individual, sent through the United States Mail to:

SOLICITOR GENERAL OF THE UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

/s/William Thomas
William Thomas

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5595

UNITED STATES OF AMERICA

v.

WILLIAM THOMAS,
a/k/a "COOKIE"

William Thomas,
Appellant

On Appeal from the United States District Court for the Middle District of Pennsylvania at Scranton
(D.C. Criminal No. 88-00044-01)

District Judge: William J. Nealon

Argued December 8, 1988

Before: SLOVITER and BECKER, Circuit Judges and FULLAM, District Judge*

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* Honorable John P. Fullam, Chief Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to wit:

Whether the indictment, proof at trial and charge fail to meet the requirement of the mail fraud statute that the scheme contemplates a loss of money or property;

Whether the indictment, proof at trial and charge fail to meet the requirement of the mail fraud statute since the objectives of the alleged conspiracy would have been accomplished prior to any mailings;

Whether the government has failed to allege facts in the indictment or to prove a mailing in furtherance of the purported scheme to defraud so that the court is without jurisdiction in the case at bar;

Whether the notification required by state imperative cannot be found to

support a mail fraud charge or conviction;

Whether the government failed to prove at trial that the mailing in this case was either in the normal course of business or reasonably foreseeable, it is

ORDERED AND ADJUDGED that the judgment of the district court be and is hereby affirmed.

By the Court,

_____
Circuit Judge

ATTEST:

_____
Sally Mrvos, Clerk

DATED: December 13, 1988

Certified as a true copy and issued in lieu of a formal mandate on January 20, 1989.

Test:

Chief Deputy Clerk, United States Court of Appeals, for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5595

UNITED STATES OF AMERICA

v.

WILLIAM THOMAS, a/k/a
"Cookie",

William Thomas, Appellant

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and NYGAARD, Circuit Judge, and FULLAM, District Judge*

The petition for rehearing filed by Appellant, William Thomas, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____

Circuit Judge

Dated: January 9, 1989

* Hon. John P. Fullam, Chief Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.